Office - Supreme Court, U.S.
FILED
OCT 18 1982
STEVAS,
CLERK

No. 82-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR, AS GOVERNOR OF THE STATE OF INDIANA, *et al.*,
Petitioners,
v.
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENT BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS IN OPPOSITION

JOHN WOOD
BAMBERGER AND FEIBLEMAN
500 Union Federal Building
Indianapolis, Indiana 46204
317/639-5151

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Washington, D.C. 20064
202/832-8525

Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the district court and the court of appeals abused their discretion in placing on the State of Indiana the responsibility for financing the remedy for a constitutional violation involving racial segregation among public school districts in Indiana where the constitutional violation was committed solely by the State and not by any of the affected school districts.

2. Whether the district court and court of appeals erred in holding that a state statute apportioning the costs of interdistrict court-ordered transfers among the State and its school districts did not apply to a situation in which the State had been adjudicated the sole violator and, in any event, could not serve to limit the State's liability for its own constitutional violations.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
Columbus Board of Education v. *Penick*, 443 U.S. 449 (1979)	4, 5
Liddell v. *Board of Education of St. Louis*, 667 F.2d 643 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 634 (1981)	5
Milliken v. *Bradley*, 433 U.S. 267 (1977)	3, 4, 5, 7, 8
Milliken v. *Bradley*, 418 U.S. 717 (1974)	2
Penick v. *Columbus Board of Education*, 519 F. Supp. 925 (S.D. Ohio 1981), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982)	5
Reed v. *Rhodes*, 500 F. Supp. 404 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982)	5
United States v. *Board of School Comm.* (7th Cir. 1980), 637 F.2d 1101, *aff'g*, 506 F. Supp. 657 (S.D. Ind. 1979), *cert. denied*, 449 U.S. 838 (1980)	3, 6, 8, 9
United States v. *Board of School Comm.* (7th Cir. 1974), 503 F.2d 68, *rev'g*, 368 F. Supp. 1191 (S.D. Ind. 1973), *cert. denied*, 421 U.S. 929 (1975)	2
United States v. *Board of School Comm.* (S.D. Ind. 1978), 456 F. Supp. 183	3
Washington, et al. v. *Seattle School District No. 1, et al.*, —— U.S. ——, 50 U.S.L.W. 4998 (June 30, 1982)	6

Constitutional and Statutory Provisions:	
I.C. 20-8.1-6.5-1 *et seq.* (Transfer Statute)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-479

ROBERT D. ORR, AS GOVERNOR OF THE STATE OF INDIANA, *et al.*,
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENT BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' principal contention is that in taxing to them the full costs of remedying the constitutional violation found in this case, the courts below erred by failing to give effect to a state statute which prescribed an alternative means for allocating such costs. The inapplicability and irrelevance of the state statute—the Indiana Transfer Act—is demonstrated not only by its text, but by surrounding legal and historical circumstances that are omitted from petitioners' statement of the case.

Petitioners are correct in asserting (p. 3) that the Indiana Transfer Statute was enacted in 1974 "at the

behest of the district court in its 1973 opinion, 368 F.Supp. at 1224-1227." But this 1973 opinion calling for interdistrict transfers and the transfer statute itself were based on a theory of liability long since discarded in this case. The decision held that transfers were required by constitutional violations committed solely within the Indianapolis school district (IPS) for which the State was jointly responsible, and were necessary to provide an effective remedy for resulting segregative conditions in IPS schools. 368 F.Supp. 1191, 1197-1208. The court expressly found it unnecessary to rule on the constitutionality of those provisions of state legislation (Uni-Gov) which froze the boundaries of IPS and surrounding school districts while expanding other governmental functions of the city to the county line. 368 F.Supp. at 1208.

The district court's 1973 decision was reversed by the court of appeals following this Court's decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*), holding that an interdistrict school desegregation remedy could be imposed by a federal court only upon a finding that a constitutional violation within a single school district had interdistrict effects, or that a separate interdistrict violation was committed by the state or other governmental entities. The court of appeals directed the district court to determine the constitutionality of the Uni-Gov legislation in its relation to school boundaries. 503 F.2d 68, 86 (1974), *cert. denied*, 421 U.S. 929 (1975). This Court's *Milliken I* decision and the 1974 decision of the court of appeals in this case were rendered subsequent to the passage of the Indiana Transfer Act, which responded to the district court's 1973 decision.

The ultimate basis for requiring an interdistrict remedy was a finding of a constitutional violation wholly distinct from that contained in the 1973 opinion and posited in the Transfer Act. The district court found that the State had committed an interdistrict constitutional violation in establishing new civil city boundaries

without a like reestablishment of IPS boundaries, and that the Housing Authority of the City of Indianapolis, a state-created agency having no connection with school governments, likewise committed an interdistrict constitutional violation by locating new public housing projects solely within IPS boundaries. 456 F.Supp. 183, 188-189. The interdistrict remedy was supported by the district court on the basis of those interdistrict violations, 506 F.Supp. 657, 663-665, and affirmed by the court of appeals primarily in reliance on the Uni-Gov violation. 637 F.2d 1101, 1113-1114. Rejecting assertions made by IPS, the district court expressly found that the intra-IPS constitutional violations had no interdistrict effect, 506 F. Supp. 657-667, *aff'd*, 637 F.2d 1101, 1112.

As part of its remedial order, the district court ordered the State to design, cause to be implemented in the transferee districts, and pay all costs not otherwise funded of a comprehensive program of in-service training and other ancillary relief. 506 F.Supp. 657, 671-674, 678. The court of appeals affirmed that portion of the judgment on authority of *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*). 637 F.2d at 1116.

Contrary to the statement of petitioners (p. 3), the court of appeals specifically rejected the Transfer Act as a basis for liability, stating that "[i]t is not an independent source of authority to require student transfers and cannot, standing alone, be the basis for a desegregation order." 637 F.2d at 1112.

This Court denied certiorari on petitions by the State, suburban school corporations and IPS. 449 U.S. 838 (1980).

SUMMARY OF ARGUMENT

The remedial order of the district court, imposing on the State of Indiana the responsibility for financing the interdistrict student transfers in this case, simply applied

to the facts of the constitutional violation previously adjudicated the well-settled principle of school desegregation remedies that "the remedy imposed by a court of equity should be commensurate with the violation ascertained." *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979). Since the State was the constitutional wrongdoer in the interdistrict phase of the case, the court of appeals correctly applied that basic principle in affirming the district court's order. The Indiana Transfer Act did not require the courts below to reach a different result since it was not facially applicable to situations in which the State was the principal or sole wrongdoer.

Even if the Transfer Act had been intended to limit the scope of the State's remedial obligations where the State itself was found to be the constitutional wrongdoer, the statute could not be used by the State to diminish responsibility for correcting its own wrongs. The Tenth Amendment provides no shield for a state against a federal court order which simply holds the State legally responsible to remedy its own violations of the Fourteenth Amendment. *Milliken* v. *Bradley*, 433 U.S. 267, 291 (1977). Nor did the courts below exceed their remedial authority in ordering the State to finance the obligations imposed by the order from funds not otherwise appropriated. This step, necessary in this case to prevent the State from reapportioning costs to the detriment of local school districts and black students, was expressly approved by this Court in *Milliken II*, 433 U.S. at 295 (Powell, J., concurring).

Finally, petitioners may not reduce their liability by belatedly pointing to inequities in the underlying remedial decree which has been finally approved and long since implemented. This is particularly the case where petitioners themselves have authority to redress the perceived inequities through a restructuring of local governance arrangements.

ARGUMENT

1. The decisions below were a correct and routine application of the basic principle that the remedy imposed by a court of equity should be commensurate with the violation and that a wrongdoer is liable for the cost of rectifying his wrongful conduct. *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*); *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979); *Liddell* v. *Board of Education of St. Louis*, 667 F.2d 643 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 634 (1981); *Reed* v. *Rhodes*, 500 F.Supp. 404, 425-426 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982); *Penick* v. *Columbus Board of Education*, 519 F.Supp. 925, 942 (S.D. Ohio 1981), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982).

The only difference is that in the above-cited lower court cases, the wrong was of an intradistrict character and local districts shared with the state responsibility for the constitutional violation, whereas here the State was solely responsible for the interdistrict violation and thus was assessed the full cost of remedy. The principle, however, is precisely the same.

Petitioners seek to escape this principle, the application of which is not in conflict among the circuits, by reliance on a state statute which allocates costs of interdistrict desegregation transfers to local school districts.[1] But that statute on its face applies in situations where interdis-

---

[1] The Transfer Act requires the transferor school corporation to pay the receiving corporation transfer tuition and specifies the mechanics for computing payments. Sections 3, 5 and 6. Petitioners erroneously imply (p. 4 n.3) that the statute obligates the State to fund part of the educational costs of interdistrict transfers. In fact, the cited provisions apply only to a temporary transition period and no State funds have been appropriated under these provisions. The transferor corporation is also made responsible for providing or securing transportation for the transferred students. Sections 7, 8.

trict transfers grow out of constitutional violations by a local school corporation.[2] That is not the case here where the interdistrict remedy has been predicated entirely on constitutional violations by the State and its housing agency. 506 F.Supp. 657; 637 F.2d 1101, 1113-1114.

Petitioners also seek (pp. 11-13) to bring the Indiana Transfer Act back into play by arguing that the courts below were obligated to look behind the findings of State violation and to determine that the violations were induced by actions of public officials in suburban Marion County. They cite no authority (and indeed there is none) except the dissenting opinion below for this novel theory, which would introduce enormous complexity into determinations of State responsibility for its legislative acts. Even assuming there were some merit to the State's point, the result of applying the Transfer Act here would be to affix responsibility for costs on the transferor corporation (IPS), which all parties concede is not liable for the interdistrict violation, and to continue to hold harmless the suburban transferee districts which the State urges induced the violation.[3]

---

[2] As noted, *supra*, p. 2, the statute was enacted in response to a theory of liability long since discarded in this case. Section 1 (Pet. App. at A-66).

[3] Petitioners' further suggestion (p. 10) that none of the school districts has standing to question the applicability of the State Transfer Act is not a serious argument. IPS and all of the suburban districts have been parties throughout the interdistrict case for purposes of determining both liability and remedial obligations. Just as districts in *Milliken, Liddell, Penick* and other cases could not be barred from participating in the determination of which governmental entity bears responsibility for the costs of a constitutional violation, the districts here cannot be so foreclosed. The existence of a state statute is no impediment to standing. As recently as June 30, 1982, this Court not only upheld the claim of a local school board that a state statute violated the Fourteenth Amendment, but sustained an award of attorneys fees to the local board from the state. *Washington, et al.* v. *Seattle School District No. 1, et al.*, —— U.S. ——, 50 U.S.L.W. 4998, 5006 n.31 (June 30, 1982).

2. Even if the Transfer Act were applicable in its terms to this case, the court of appeals correctly concluded that the district court would not be bound by its terms in assessing the costs of correcting the violation. The existence of a state statute purporting to absolve the state or diminish its responsibility for the consequences of unconstitutional conduct does not give rise to a claim under the Tenth Amendment. As this Court said in *Milliken II*:

> The Tenth Amendment's reservation of non-delegated powers to the states is not implicated by a federal court judgment enforcing the express prohibition of unlawful state conduct enacted by the Fourteenth Amendment. (Citation omitted). Nor are the principles of federalism abrogated by the decree. 433 U.S. at 291.

3. Contrary to petitioners' assertion (p. 9), no additional or novel problem is raised by inclusion in the order of a provision specifying that payments required to be made by the State "shall first be paid from funds not appropriated for any other purpose" (paragraph 6, Pet. App. at A-33).[4] As the court of appeals pointed out, the paragraph does not operate to prevent the Indiana legislature from allocating funds in the future in any way it chooses as long as it appropriates amounts sufficient to meet the costs of desegregation. Rather, lacking a specific appropriation at the time the order was entered, the provision was necessary to insure that the State would not shift the financial burden to IPS and suburban school districts, requiring them to decrease the educational offering to their students. As the court said, "[i]nnocent black children in IPS have suffered enough." [Pet. App. at A-10].[5]

---

[4] Petitioners' reprint of the order omits the important word "other" from the sentence.

[5] A similar order had been entered by the district court in 1979 in the judgment directing the State to pay the costs of an ancillary

Ample precedent for this aspect of the order is found in *Milliken II* where Justice Powell observed:

> Ordinarily, a federal court's order that a state pay unappropriated funds to a locality would raise the gravest constitutional issues. . . But here, in a finding no longer subject to review, the State has been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate. 433 U.S. at 295.

That is precisely the situation in this case.

4. A last, curious argument, raised by petitioners for the first time here (pp. 10-13) is based on the belatedly arrived-at view that the final substantive relief awarded in this case is inequitable. Petitioners now adopt a position urged unsuccessfully by IPS alone in previous proceedings—that a consolidation or reorganization of school districts in Marion County would have been better calculated than interdistrict transfers to redress the constitutional violation and to provide an equitable remedy to IPS black students. Building on this notion, petitioners suggest that unless local school districts are taxed with a part of the costs of the desegregation decree, they will have no incentive to move toward consolidation or redistricting.

A complete answer to this claim is that the court of appeals rejected consolidation or reorganization as a proposed remedy, stating that while "[t]he most closely tailored remedy would likely be one that would allow IPS to expand to the city borders," it "would have been far more intrusive into local political processes." 637 F.2d at 1114. When this Court denied certiorari in 1980 (449 U.S. 838) the judgment became final.

---

relief relating to interdistrict desegregation. 506 F. Supp. at 674. The order was affirmed by the court of appeals simply on the citation of *Milliken II*. 637 F.2d at 1116.

It may be added that even if petitioners' objections were timely, it would clearly be inappropriate to deal with the problem by affixing liability for costs upon local school districts which have been adjudged not responsible for the violations which support the interdistrict remedy. 637 F.2d 1101, 1105-1108, 1116.[6] If the State, which created the constitutional problem in the first place by freezing the boundaries of IPS, wishes to deal with the inequities it perceives through consolidation or reorganization of school districts, it of course has authority to do so by appropriate legislation.

CONCLUSION

For the foregoing reasons, the State's petition presents no issue worthy of review by this Court. The orders below determining state liability are simply a routine application of long established principles frequently reiterated by this Court. Therefore, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN WOOD
BAMBERGER AND FEIBLEMAN
500 Union Federal Building
Indianapolis, Indiana 46204
317/639-5151

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Washington, D.C. 20064
202/832-8525

Attorneys for Respondent

Dated: October 18, 1982

[6] The court of appeals affirmance of the financing order was based on those previous rulings.